

STATE OF NEW YORK
OFFICE OF CANNABIS MANAGEMENT
OFFICE OF ADMINISTRATIVE HEARINGS

OFFICE OF CANNABIS MANAGEMENT,

Petitioner,

-against-

DECISION

Inspection No. 30420241030001

LIFT OFF SMOKE SHOP INC.

Respondent.

Respondent requested an emergency hearing on November 6, 2024 which was made within seven (7) calendar days of the date of the inspection which occurred on October 30, 2024.

The emergency hearing was conducted on November 19, 2024 pursuant to a mutual agreement between the parties.

The Respondent was represented by Phil Modrzynski, Esq.

No witnesses testified on behalf of the Respondent.

The Office of Cannabis Management (hereinafter “OCM”) was represented by Michael Waller, Esq.

OCM Supervising Investigator Dean Del Negro, Assistant Director of Enforcement of Mark LaMonte, Legal Assistant 2 Alicia Pesos, and Town of Greece Police Detective Joseph DeMarco testified on behalf of OCM.

ISSUE

The allegations set forth in the Notice of Violation indicate that the Respondent was offering cannabis products, as defined by Cannabis Law Article 3, for sale without an appropriate registration, license, or permit. This allegation was based upon observations made during a regulatory inspection which was conducted at 644 Monroe Ave, Rochester, NY 14607.

The scope of the emergency hearing was limited solely to the issue as to whether or not the padlocking provisions Cannabis Law Article 6 § 138-b of have been met by a preponderance of the evidence.

Should either party file a request for an additional hearing to adjudicate the sufficiency of the Notice of Violation and the Order to Cease Unlicensed Activity, that hearing will be scheduled for a later date.

APPLICABLE LAW

Cannabis Law Article 6 §138(a) provides that “The board or the Office of Cannabis Management shall, in accordance with the authority otherwise conferred in this chapter, have the authority to: 1. order any person who is unlawfully cultivating, processing, distributing or selling cannabis, cannabis product, cannabinoid hemp or hemp extract product, or any product marketed or labeled as such in this state without obtaining the appropriate registration, license, or permit therefor, or engaging in an indirect retail sale to cease such prohibited conduct. 2. seize any cannabis, cannabis product, cannabinoid hemp or hemp extract product, or any product marketed or labeled as such, found in the possession of a person engaged in the conduct described in subdivision one of this section.”

Cannabis Law Article 6 § 138-b(1) provides that orders to seal: In addition to any other authority conferred in this chapter, pursuant to the provisions of this section, the board or the office shall have the authority to issue an order to seal the building or premises of any business engaged in unlicensed activity, when such activity is conducted, maintained, or permitted in such building or premises, occupied as a place of business as described in subdivision eight of section ten of this chapter, in violation of subdivision one or one-a of section one hundred twenty-five or subdivision one or eight or section one hundred thirty-two of this article.

Cannabis Law Article 6 §138-b(6) provides that an order to seal may be issued by the office or the board pursuant to subdivision three of this section only if:

- (a) no part of the premises to be sealed is used in part as a residence and pursuant to local law or ordinance is zoned and lawfully occupied as a residence; and
- (b) the unlicensed activity as described in this section is more than a de minimis part of the business activity on the premises or in the building to be sealed pursuant to this subdivision, the office shall issue a notice of violation and order to cease the unlicensed conduct, which shall constitute notice that such activity must cease immediately. (See Regulations at 9 NYCRR 133.25(f)(2-3)).

Cannabis Law Article 6 §138-b(7) provides that in assessing whether unlicensed activity within a building is more than de minimis, the office or board, as relevant, shall consider factors such as any one or more of the following:

- (a) the presence of signs or symbols, indoors or out, advertising the sale of cannabis or otherwise indicating that cannabis is sold on the premises;
- (b) information shared in any advertisements or other marketing content in connection with the unlicensed business activity and any direct or indirect sales of cannabis or other conduct in violation of this chapter;

- (c) the volume of illicit cannabis products on site; and
- (d) the variety of illicit cannabis products on site. (See Regulations at 9 NYCRR 133.25(f)(3)(i-iv)).

Cannabis Law Article 6 §138-b (3) provides that the office may issue an order to seal with an immediate effective date if such order is based upon a finding by the office of an imminent threat to the public health, safety and welfare. (See Regulations at 9 NYCRR 133.25(f)(1)).

Cannabis Law Article 6 §138-b(4) sets forth the factors that determine an imminent threat to public health, safety, and welfare shall be limited to:

- (a) documented sales to minors;
- (b) unlicensed processing of cannabis products at the building or premises;
- (c) orders issued following an inspection wherein the person engaged in the unlicensed activity engaged in violent, tumultuous, or other behaviors indicating expressed intent to not comply with the office's order to cease the unlicensed activity;
- (d) documented presence of unlawful firearms at the building or premises;
- (e) proximity of the building or premises to schools, houses of worship, or public youth facilities;
- (f) presence of products deemed unsafe based on reports of illness or hospitalization; or
- (g) sales of, or offers to sell, cannabis products not tested or labeled lawfully in accordance with this chapter. (See Regulations at 9 NYCRR 133.25(f)(1)(i-vii)).

Cannabis Law Article 6 §138(b)(2) provides that any order to seal shall be served by delivery of the order to the owner of the business or other person of suitable age or discretion in actual or apparent control of the premises at the time of the inspection and shall be posted at the building or premises that have been sealed, secured and closed. A copy of the order shall also be mailed to any address for the owner of the business at any address provided by the person to whom such order was delivered pursuant to this subdivision. The order shall remain in effect pending a hearing and final determination of the board, or until such order is vacated by the office pursuant to subdivision six of this section. An order to seal shall explicitly state the procedure to request a hearing within seven days.

Cannabis Law Article 6 § 138(b)(8)(c) provides that upon service and execution of the order to seal, the police officer or peace officer shall post a copy thereof in a conspicuous place or upon one or more of the principal doors at entrances of such premises where the unlicensed activity is being conducted, maintained, or permitted. In addition, the officer shall affix, in a conspicuous place or upon one or more of the principal doors at entrances of such

premises, a printed notice that the premises have been closed by order of the cannabis control board, and the name of the officer or agency posting the notice.

FINDINGS OF FACT

Prior to testimony being taken, the parties stipulated to a series of facts, which have been attached to this decision and entitled “STIPULATED AGREEMENT.” The stated intention of the stipulation was that it would have “the same effect as if OCM had proven every other required element to establish proper issuance of an Order to Seal at the hearing.” The only contested issue is whether there was Proper Posting, Delivery and Service of the Order to Seal Under Cannabis Law § 138-b(2) & 138-b(8)(c).

On October 30, 2024, OCM Supervising Investigator Dean Del Negro (hereinafter “Investigator Del Negro”) conducted a regulatory inspection of Lift off Smoke Shop Inc. in conjunction with members of the Town of Greece Police Department, pursuant to a search warrant issued October 24, 2024 (Exh B 11-12). The inspection occurred at approximately 8:00 a.m., prior to the time that the shop was open to the public and no employees were present. At the conclusion of the inspection, Investigator Del Negro documented his findings pursuant a Notice of Violation/Order to Cease Unlicensed Activity/Order to Seal (hereinafter collectively “NOV”) (Exh C 1) and posted the document on the glass storefront (Exh C 2). The premises was padlocked based upon a determination made as a result of the regulatory inspection.

OCM Assistant Director of Enforcement of Mark LaMonte (hereinafter “Investigator LaMonte”) testified that he was not present and did not participate in the regulatory inspection of Lift Off Smoke Shop Inc. which occurred on October 30, 2024. Investigator LaMonte testified that he spoke with the Respondent at the Town of Greece Police Department and showed him a blank copy of an NOV and also testified that Respondent was in possession of a copy of a completed NOV issued in relation to another location. Investigator LaMonte did not have a copy of the completed NOV resulting from the regulatory inspection at Lift Off Smoke Shop Inc. therefore at no time was one was provided to the Respondent. According to Investigator LaMonte, he advised Respondent to go to the location to read the physical copy of the NOV which was posted on the storefront so as to be aware of the specific findings resulting from the regulatory inspection which led to a determination to seal the premises. Investigator LaMonte testified that he expected the Respondent to be released from being detained by the Greece Police Department however was unaware as to when that would occur.

OCM Legal Assistant 2 Alicia Pasos testified that she completed a four-page document entitled “Affirmation of Service By Mailing to Business Owner” which was entered into evidence as Exhibit F. Pursuant to that document, she attested that on November 18, 2024 she mailed Notices of Violation to three individuals including Respondent as well as one to the business address (Exh F). Ms. Pasos further testified that she obtained the NOV by printing it out on legal size paper consistent with the size of the NOV and that it was a double-sided document consistent with the NOV. According to Ms. Pasos, she placed the envelopes containing the NOVs into a repository maintained by OCM which she was advised was picked up between 12:00 p.m. – 2:00 p.m. however did not confirm that the mail was in fact taken on that day.

“In an administrative proceeding the standard for service is whether the notice under all the circumstances is reasonably calculated to make the parties aware of the proceeding so that they have an opportunity to be heard.” See *Reda v. Dep’t of Health of City of New York*, 137 Misc.2d 61, 63, (Sup. Ct. 1987), *aff’d*, 143 A.D.2d 1073 (1988) Citing *Matter of Infante v. Donohue*, 42 Misc.2d 727 [Sup. Ct. Albany Co., 1964]). Additionally, “as with all administrative tribunals, ...[it] derives its jurisdiction and powers from the statute which created it.” *Id.* Citing *Foy v. Schechter*, 1 N.Y.2d 604, 154 N.Y.S.2d 927, 136 N.E.2d 883. Cannabis Law Article 6 §138(b)(2) provides that the NOV must be served in person, by mail sent to an address provided by the individual personally served, and by posting a copy on the building or premises to be sealed (Cannabis Law Article 6 §138(b)(2)). In the present case, as there were no employees at the location at the time of the regulatory inspection, personal service could not be effectuated at that time. Furthermore, Investigator LaMonte’s reliance on an NOV in Respondent’s possession pertaining to a location other than Lift Off Smoke Shop Inc. or by showing him a blank NOV is not sufficient to effectuate personal service. Personal service could have been accomplished had Investigator LaMonte provided Respondent with a copy of the NOV issued with respect to the subject location at the time that he was at the Greece Police Department however he did not do so. Utilizing an NOV issued to another location or a blank NOV in an attempt to advise the Respondent how to request a hearing does not suffice as personal service. In addition, I find that the Petitioner cannot circumvent the need to personally serve the NOV upon the Respondent by advising him to physically go to the location to read the language contained in the NOV posted on the subject location.

While Ms. Pasos testified that she mailed copies of the NOV to the Respondent, I note that the date of mailing was November 18, 2024, the day prior to the hearing in this matter. As such, I find that it was unreasonable to expect that the Respondent would receive the NOV within 24 hours of mailing and thus the Petitioner’s actions in doing so was a self-serving and an insufficient attempt to comply with the mailing requirements set forth in Cannabis Law Article 6 §138(b)(2).

Cannabis Law Article 6 § 138(b)(8)(c) requires that upon service and execution of the order to seal, the document must be posted in a conspicuous location at the premises as well as a printed notice that the premises have been closed by order of the cannabis control board, and the name of the officer or agency posting the notice. I note the language specifies that the postings of the NOV are required “upon service and execution of the order to seal.” In this case, the testimony and photographs establish that the posting of the NOV and “printed notice that the premises have been closed by order of the cannabis control board, and the name of the officer or agency posting the notice” were satisfied (Exh C 2) however in the absence of the service and execution of the order to seal, I find that the service requirements set forth in Cannabis Law Article 6 § 138(b)(8)(c) were not satisfied.

As such, I find that Petitioner did not establish compliance with the Proper Posting, Delivery and Service of the Order to Seal requirements set forth in Cannabis Law § 138-b(2) & 138-b(8)(c).

WHEREFORE, PURSUANT TO CANNABIS LAW ARTICLE 6 §138-b (9), THE ORDER TO SEAL, ISSUED ON OCTOBER 30, 2024, IS HEREBY VACATED AND THE PADLOCK SHALL BE REMOVED IMMEDIATELY.

Dated: November 22, 2024

Karen Lavery
Administrative Law Judge

PLEASE BE ADVISED: Either party may appeal this decision within 30 calendar days of receipt, according to the specific manner described in Regulations at 9 NYCRR 133.25(k).

This decision was sent via email on November 22, 2024, to the following:

Nickolas Perry
Sheila Wagner
Celena Ditchev, Esq.
Michal Waller, Esq.
Phil Modrzynski, Esq.